85-681 (1)

Supreme Court, U.S.
FILED
OCT 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WESTERN RESERVE OIL AND GAS CO., LTD.; TREVOR M. PHILLIPS; and 1983 WESTERN RESERVE OIL AND GAS CO., LTD.
Petitioners

v.

H. STEVEN NEW, BOBBIE J. TADLOCK, MARY SAAVEDRA, MARY ELLEN DENERS, HOWARD CHIN, ROBERT M. McKEEVER, WILLIAM H. CONNETT, SCOTT J. CRABTREE, DONALD W. WOLF, COMMISSIONER OF THE INTERNAL REVENUE ROSCOE EGGER,JR., SECRETARY OF THE TREASURY, JAMES BAKER, JUDY MATTHEWS, CLERK FOR HONORABLE EDWARD RAFEEDIE U.S. DISTRICT COURT JUDGE, ALL MEMBERS OF CONGRESS

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT ARISING FROM AN OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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97 PP

QUESTIONS PRESENTED

QUESTION #1: Did the U.S. Court of Appeals for the Ninth Circuit abuse its discretion in not determining whether the Congressional exercise of one of its ennumerated powers (the enactment of IRC Sec. 6700, 6701, 6702, 6703) that clashed with individual liberties (loss of First, Fifth and Eighth Amendment rights) protected by the Bill of Rights can be tolerated?

QUESTION #2: Did the U.S. Court of Appeals for the Ninth Circuit abuse its discretion by failing to void for vagueness and indefiniteness those statutes of the IRC Sec. 6111, 6112, 6700, 6701, 6702 and 6703, Ex. 1a-f that penalize alleged conduct without notice of what alleged conduct is proscribed?

QUESTION #3: Did the U.S. Court of Appeals for the Ninth Circuit err by not treating the individual Petitioners

Western Reserve Oil & Gas Co., Ltd. and 1983 Western Reserve Oil & Gas Co., Ltd. and Trevor M. Phillips separately rather than collectively in that their rights and remedies are indeed separate and distinct in that Western Reserve Oil & Gas Co., Ltd. is a limited partnership formed in 1981 with separate and distinct rights and remedies from 1983 Western Reserve Oil & Gas Co., Ltd. which was formed in 1983 with separate and distinct rights and remedies from Trevor M. Phillips who is not only an individual General Partner in the referred to limited partnerships but also a separate person and an investor with distinct and separate rights and remedies?

QUESTION #4: Did the U.S. Court of Appeals for the Ninth Circuit err in its statement of "FACTS" as reported in its Opinion that Petitioner Phillips filed an action in the District Court seeking

monetary damages from individually named IRS agents for the issuance of "pre-filing notification letters" when in fact Petitioner Phillips sought damages for loss of legitimate occupation coupled with damaged reputation absent procedural due process of law when it did not adhere to the First Amendment standard set forth in Bill Johnson's Restaurants v. NLRB, 103 S.Ct. 2169?

QUESTION #5: Did the U.S. Court of Appeals for the Ninth Circuit abuse its discretion by stating that Petitioners were operating businesses in violation of the tax laws when the tax benefits claimed are a matter of statutory entitlement for persons entitled to receive them and are not in violation of the tax laws but are a means by which Congress intended to Promote the General Welfare and Secure the Blessings of Liberty to ourselves and our

Posterity by not addressing an arbitrary administrative determination absent judicial review which arbitary administrative determination was intended to deprive eligible persons the very benefits which Congress intended to promote?

QUESTION #6: Did the U.S. Court of Appeals for the Ninth Circuit err in its determination that the facts presented in this case are virtually identical to those in Mid-South Music Corp.?

QUESTION #7: Did the U.S. Court of Appeals for the Ninth Circuit err in determining that federal agents were acting well within the scope of authority delegated to those federal agents when those federal agents flagrantly and knowingly deprived Petitioner Phillips his Constitutional right to the information he sought on many occasions in order to access procedural due process?

QUESTION #8: Did the U.S. Court of Appeals for the Ninth Circuit err in not addressing the issue the District Court used as an alternative ground for dismissal that the federal agents were immune from suit?

QUESTION #9: Did the U.S. Court of Appeals for the Ninth Circuit err in its Opinion that Petitioners failed to state a sufficient claim of denial of due process and stated in its Opinion Petitioners are afforded adequate post-enforcement opportunities for judicial review when in fact neither readjustment of a Partnership item or illegally assessed or collected taxes were at issue?

QUESTION #10: Did the U.S. Court of Appeals for the Ninth Circuit abuse its discretion by not distinguishing between unreasonable governmental interference, a conspiracy to deprive rights when Respon-

dents admitted in oral argument to the Court that they committed a lawful act by unlawful means in an overt ("spiteful") manner in order to inflict irreparable harm on Petitioners when the Court did not hold to the standards set forth in Hampton v. Hanrahan, 600 F.2d 600-620, 622, 623, 624 (7th Cir. 1963) "circumstantial evidence may provide adequate proof of conspiracy" or looking to the "predictable aspect of perjury" by Respondent Tadlock and New, Ex. 23 in the moving papers while acting "under color of law" ?

QUESTION #11: Did the U.S. Court of Appeals for the Ninth Circuit abuse its discretion by raising an administrative determination, the pre-filing notification letter, which has no force or effect at law to the level of judicial creditability absent any trace of evidence, facts, law or basis when that determination carried

with it the power to deprive Petitioners First, Fifth and Eighth Amendment rights to Association, Life, Liberty, and Property absent procedural due process?

QUESTION #12: Did the U.S. Court of Appeals for the Ninth Circuit abuse its discretion by not recognizing Petitioners had the right to be free from cruel and unusual punishment by not holding to the standards set forth in Estelle v. Gamble, 429 U.S. 97 (1976) which established the right to be free from conduct of an official acting with particular malice, recklessness or indifference and that Respondents one and all were joint tortfeasors in that it is difficult to determine which Respondent delivered the blows that caused the deprivations, Dean v. Gladney, 621 F.2d 1331, 1338 (5th Cir 1980) and that all Respondents acquiesced by failing to protect Petitioners'

Constitutionally guaranteed rights making one and all Respondents respondeat superior, Johnson v. Duffy, 588 F.2d 740, 743, 744 (9th Cir. 1978) and Monell v. Dept. Social Services, 436 U.S. 658, 692 (1978) and Commonwealth of Pa. v. Porter, 659 F.2d 306, (3rd Cir. 1981) and Alvarez v. Wilson, 431 F. Supp. 136, 146 (N.D. Ill. 1977)?

QUESTION #13: Did the U.S. Court of Appeals for the Ninth Circuit err by not recognizing that Petitioners one and all did have the right to invoke the procedural due process clause after receiving notice from federal agents of an impending Injunction proceeding the purpose of which notice was to inform Petitioners that federal agents intended to deprive them of First, Fifth and Eighth Amendment Rights?

QUESTION #14: Did the U.S. Court of Appeals for the Ninth Circuit abuse its

discretion by not recognizing that Petitioner Phillips' cognizable property right was his lawful employment, that his cognizable liberty right was his freedom to practice his legitimate chosen profession and his cognizable First Amendment right was to lawfully associate?

QUESTION #15: Did the U.S. Court of Appeals for the Ninth Circuit abuse its discretion by not recognizing that Petitioners Western Reserve Oil and Gas Co., Ltd. and 1983 Western Reserve Oil and Gas Co., Ltd. were legitimately entitled to their actual vested cognizable property rights sufficient to invoke the procedural protection of the Due Process clause?

QUESTION #16: Did the U.S.Court of Appeals for the Ninth Circuit abuse its discretion by not holding to the established standards set forth in Greene V. McElroy, 360 U.S. 474; US v. Robel, 88

U.S. 420 (1967); Shelton v. Tucker, U. S. v. Brown, 381 U.S. 437, 461, 85 S.Ct. 1707, 1721, 14 L.Ed.2d 484 (1965); The Japanese Immigrant Case, 189 U.S. 86, 101; Dismuke v. U.S., 297 U.S. 167, 172, (a) in the absence of explicit authorization from either the President or Congress federal agents are not empowered to deprive Petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination; (b) where statutes quite literally establish guilt by association alone, without any need to establish that an individual's association poses a threat feared by the government in proscribing it the inhibiting effect on the exercise of First Amendment rights is clear; (c) when legitimate concerns are expressed in a statute which imposes a substantial burden on protected First

Amendment activities Congress must achieve its goal by means which have a less drastic impact on the continued vitality of First Amendment freedoms; (d) where administrative action has raised serious Constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process?

QUESTION #17: Did the U.S. Court of Appeals for the Ninth Circuit err by failing to void for vagueness and indefiniteness those provisions of the 1984 Tax Reform Act relating to the registration of investments under the umbrella of Internal Revenue Code Sections 6111 and 6112 which require persons who have done nothing wrong to register just about any investment where financing is involved with the United States government under penalty for the alleged conduct of assembling a

"potentially" abusive financing plan or arrangement?

QUESTION #18: Did the United States Court of Appeals for the Ninth Circuit abuse its discretion by not addressing the questions raised by the United States District Court Judge William Matthew Byrne Jr.'s statement to the government in open Court on April 3, 1984 as follows:

> The Court: "My major concern, frankly, is neither with the IRS or with the general partner; I am concerned about the investors, what is fair to them."
>
> The Court: "Let's not play games. That is what I think is really somewhat unattractive about the Service's position here."
>
> (The Government) : "We have a position that is not appropriate tax shelter, but we are not going to tell you."
>
> The Court: "So I would suggest that they either tell me or tell you or we will get it in a format where I will find out."
>
> The Court: "You have got a vendetta going. I am not saying it is

> an improper one, but the whole thing is just a big dispute between ... you gentlemen, ladies and gentlemen, think that Phillips, if I may use a colloquialism, is a crook, and you think he is doing something wrong. You want to look at his individual returns to see if you can get him on those. You want to attempt to stop him, as you say, from selling these tax shelters."
>
> The Court: "There are interesting questions that will be resolved someday with reference to the effect of those letters, LEGALLY and CONSTITUTIONALLY ... "

QUESTION #19: Did the United States Court of Appeals for the Ninth Circuit err by failing to void for indefiniteness and vagueness Internal Revenue Procedure 83-78 because of its open-ended, unrestrained, "among other things" doctrine?

QUESTION #20: Did the United States Court of Appeals of the Ninth Circuit abuse its discretion by not responding to the pleadings of Petitioners that federal agents maliciously and knowingly unlawfully froze Petitioners' assets absent notice of any kind which instantly froze

Petitioners access to due process of law in violation of the due process noticing procedure of IRC section 6703 which requires a 30 day noticing period and/or Subchapter D, Section 6331(d)(2)(A)(B) and (C) which in the alternative requires a 10 day noticing period of intent to levy?

QUESTION #21: Did the United States Court of Appeals of the Ninth Circuit abuse its discretion by not addressing the fact that Petitioner Phillips categorically denied that he was promoting abusive tax shelters and spoke at length that the deductions and/or credits were statutorially allowed when they blindly accepted a spiteful administrative determination absent opportunity to confront and/or question the determination?

QUESTION #22: Did the United States Court of Appeals of the Ninth Circuit abuse its discretion by not voiding for

indefiniteness Internal Revenue Code Section 6700 which provides for excessive fines, Ex. 1c, based on anticipation of future income in conflict with many longstanding decisions rendered by the United States Supreme Court prohibiting same and exacting property discriminatorily in violation of Internal Revenue Administration Manual 1303-72 P-4-7 (12-23-60)? Ex. 22.

QUESTION #23: Did the Honorable Edward Rafeedie's Court abuse its discretion on 9-16-85, by issuing a Contempt Order and Order for arrest warrant for Phillips when the Court's initial Order had been fully complied with, Ex.7, a Dismissal signed with reconsideration period expired (see face of Complaint in Ex. 7x), and no notice of the reconsideration served on Petitioner or his counsel? Ex. 7x.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... 1

TABLE OF AUTHORITIES..... ii

JURIDICTIONAL STATEMENT..... 16

CONSTITUTIONAL PROVISION INVOLVED.. 16

STATEMENT OF THE CASE..... 18

REASONS FOR GRANTING THE WRIT..... 24

ARGUMENT..... 31

CONCLUSION..... 56

APPENDIX A

TABLE OF AUTHORITIES

Cases	Page
Alvarez v. Wilson, 431 F. Supp. 136, 146 (N.D. Ill. 1977).....	9
Bill Johnson's Restaurants v. NRLB, 103 S.Ct. 2169.....	3
Commonwealth of Pa. v. Porter, 659 F.2d 306, (3rd Cir. 1981)..	8
Dean v. Gladney, 621 F.2d 1331, 1338 (5th Cir 1980).....	7
Dismuke v. U.S., 297 U.S. 167, 172.....	10
Estelle v. Gamble, 429 U.S. 97 (1976).....	7
Foxman v. Renison, 625 F.2d 429	47
Galvin v. Press, 74 S. Ct. 737, 347 U.S. 522 (1954).....	50
Greene V. McElroy, 360 U.S. 474 (1958).....	9, 39
Hampton v. Hanrahan, 600 F.2d 600, 601-620, 622, 623, 624 (7th Cir. 1963).....	6
Helvering v. Taylor, 293 U.S. 507, 55 S.Ct. 28.....	60
Howard v. U.S., 372 F.2d 294 (1967).....	54

Johnson v. Duffy, 588 F.2d 740, 743, 744 (9th Cir. 1978)..... 8

Kaufman v. Egger, 758 F.2d 1 (1985)..... 58

Kopunek v. Director of the Internal Revenue 528 F. Supp. 134, 432 (1981)..... 47

Mid-South Music Corp. v. Kolak, 756 F.2d 23 (6th Cir. 1984)..... 42, 45 48, 49

Monell v. Dept. Social Services, 436 U.S. 658, 692 (1978) 8

Scheuer v. Rhodes, 416 U.S. 232 (1974) 51

Shelton v. Tucker, U. S. v. Brown, 381 U.S. 437, 461, 85 S.Ct. 1707, 1721 (1965)..... 10, 46

Telegraph News v. Illinois Bell, 220 F. Supp. 621 (1963), affirmed 84 S.Ct. 1134, 376 U.S. 782..... 54

The Japanese Immigrant Case, 189 U.S. 86, 101..... 10

United States v. Millman, 765 F.2d 27 (1985)..... 51

US v. Robel, 88 U.S. 420 (1967)..... 9, 46

Wood v. Strickland, 420 U.S. 322, 95 S.Ct 1001 (1974)..... 51

TABLE OF AUTHORITIES (Cont.)

	Page
Constitutional Provisions	
United States Constitution,	
First Amendment	1, 16
Fifth Amendment	1, 17 36,
Eighth Amendment	1, 17
Fourteenth Amendment	1, 17
Statutes	
26 U.S.C. Section 6111	1, 11 46, 48 54, 56
26 U.S.C. Section 6112	1, 11 46, 48 54, 56
26 U.S.C. Section (SUBCHAPTER D), 6331(d)(2)(A)(B) and (C)	14,
26 U.S.C. Section 6700	1, 15 46, 47 48, 54 56,
26 U.S.C. Section 6701	1, 46 47, 48 54, 56
26 U.S.C. Section 6702	1, 46 47, 48 54, 56

26 U.S.C. Section 6703	1, 14, 46, 47, 48, 56
26 U.S.C. Section 7214 (a)(2)....	60
26 U.S.C. Section 7408	46, 47, 48
28 U.S.C.S. Section 1254.....	16

Administrative Procedures

IRS Revenue Procedure 83-78	13, 42, 45, 47, 48, 50
Internal Revenue Administration Manual 1303-72 P-4-7 (12-23-60)	15,

Abbreviation

Ninth	United States Court of Appeals for the Ninth Circuit, Central California District
Byrne, Jr.	Honorable William Matthew Byrne, Jr. United States District Court, Central District of California
Haden,II	Honorable Charles H. Haden, II, Chief Judge United States District Court, Southern District of West Virginia
Rafeedie	Honorable Edward Rafeedie,

United States District Court Judge, Central District of California

Takasugi .....Honorable Robert M. Takasugi, United States District Court Judge, Central District of California

Waters .....Honorable Laughlin E. Waters, United States District Court Judge, Central District of California

Phillips .....Trevor M. Phillips, Petitioner

WROGC .....Western Reserve Oil & Gas Company, Ltd., Petitioner

1983 WROGC ....1983 Western Reserve Oil & Gas Company, Ltd., Petitioner

Petitioners....Trevor M. Phillips, Western Reserve Oil & Gas Company, Ltd., 1983 Western Reserve Oil & Gas Company, Ltd. collectively

Mabile.....Terry J. Mabile, former IRS Agent and business associate of Petitioners

Benefactor.....Benefactor Oil and Gas Company, Ltd.

Ex. .....See Exhibit(s) attached

IRC .....Internal Revenue Code

IRS .....Internal Revenue Service

Federal
Agents .....All government employees and government agencies involved in the case at bar.

"Touch Tone
of Due
Process".....The right of every citizen of America to be free from arbitrary and unreasonable actions of government.

JURISDICTIONAL STATEMENT

The order of the United States Court of Appeals for the Ninth Circuit, dismissing Petitioner's appeal from the United States District Court for the Central District of California, was filed on July 17, 1985, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254.

The notice of appeal was filed on September 13, 1985 with the United States Court of Appeals for the Ninth Circuit.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or the abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to

petition the Government for a redress of grievances."

Fifth Amendment, United States

Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeapordy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Eighth Amendment, United States

Constitution:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment, United States

Constitution:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The levels of United States Constitutional protection sought by Petitioners in this Writ of Certiorari action rise to the heights of non-partisan public concern and to the hearts of First, Fifth, and Eighth Amendment protections.

On or about the 22nd day of December, 1983 Respondents caused to be delivered an Information Document Request styled INJUNCTION which was later followed by a Summons to Petitioner Phillips pertaining to the same documents requested, Ex. 2a-m. From March 1983 up to this time Petitioners maintained an open door policy allowing the Respondents to fully examine any

and all books and records Respondents requested as evidenced by Ex. 3a-i. Petitioner Phillips realized that there was something irregular occurring when he recieved the notice styled INJUNCTION and Petitioner Phillips as a consequence immediately hired a Private Investigation firm to obtain some facts, Ex. 4. After realizing what Respondents were attempting to accomplish Petitioner Phillips filed for injunctive relief on behalf of all Petitioners in a Federal District Court, Ex. 5a, which relief was denied for lack of subject matter jurisdiction, as was an emergency Appeal, Ex. 5c, to the "Ninth", Petitioners were also denied a 24-hour stay to access the United States Supreme Court. Two United States Supreme Court Justices, Rehnquist and O'Connor were reviewing Petitioners' Appeal when Respondents called a law clerk of the Supreme

Court Justices and told that clerk that the prefiling notification letters had been sent. Justice Rehnquist had no alternative but to deny the relief sought because the subject matter was instantly rendered moot, Ex. 5d. Petitioners later filed the complaint which this case derives from, which case was dismissed by "Byrne, Jr.", on a Motion for Summary Judgment, Ex. 6a-c. No answer to this complaint nor the amended complaint was ever filed by Respondents therefore the facts alleged must be taken as true. An Appeal to the dismissal by "Byrne, Jr.", was timely filed and taken to the "Ninth" which apparently affirmed the decision of "Byrne, Jr." even though the face of the Opinion indicated that it was an appeal from the U.S. District Court for Central District of California, Robert M. Takasugi, District Judge presiding.

During the period of time when the case at bar was pending Respondents continued their demagogic scheme to destroy Petitioners absent any trace of procedural due process of law by causing to be filed Summons Enforcement Actions, the subject matter of which was in question from the onset because deduction and/or credits had already been disallowed and, even after satisfaction and dismissal, precipated in the issuance of an order for an arrest warrant for Phillips without notice (this "arrest order" was used by IRS Special Agents who posed as federal marshalls in an attempt to arrest Phillips without observing well established proper constitutional procedures to protect the rights and safety of Petitioner) Ex. 7a-x, imposition of excessive Miscellaneous Penalty Assessments, Ex. 8 a-d, levies on bank accounts absent notice, Ex. 9a-j,

real estate, Ex. 10a,b, and businesses, Ex. 11a,b, either owned or allegedly owned or fiduciarily held by the various Petitioners. All of the actions by Respondents have had the force and effect of not allowing Petitioners to continue their lawful businesses because of assets being frozen, Ex. 12, outrageous yet absolutely necessary additional costs of accounting, legal and financial advisors, "poll tax" type filing fees to access Federal Courts (one filing fee amounted to $600,000.00 and the Pauper defense was disallowed by "Haden, II", Ex. 13a-j), intimidating letters, assessments, levies, and other notices directed to investors, Ex. 14a-t, suppliers, Ex. 15a-d, and/or advisors, Ex. 6a,b, of the Petitioners some of which were resolved simply by the Respondents taking the position that they were clerical errors or computer errors, or

items of unknown origin, Ex. 17a-g., and the imposition of frivolious fines and penalties which stretch not only the imagination but the legal limits of the law and beyond! Such fines far exceed justifiable, if not legal, limits (over $500,000.00) Ex. 7x, and are just another incident of Respondents bad faith attempt to block Petitioners access to funds necessary to seek final legal resolution which will mean preservation of Constitutional rights for all Americans. Petitioners looked to other avenues for relief: Congressional intervention Ex. 18a-c, Freedom of Information Act Ex. 20 a,b, Byrne Letters Ex. 19a-d, and Internal Security Ex. 21a-g.

REASONS FOR GRANTING THE WRIT

The questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution because if the decision of the U.S. Court of Appeals for the Ninth Circuit is allowed to stand "as is" it will have the full force and effect of giving to federal agents the authority and power to intimidate, blacklist and even destroy any individual or business which he or she may choose to be a target without any checks and balances or safeguards guaranteed by the Constitution of the United States of America. Federal agents would be empowered to create a "McCarthyism" atmosphere in our society which would indeed be devastating. It is recognized that federal agents must have the ability to perform their duties and the right to exercise discretion but

these rights must be tempered and bridled with safeguards for the individual's rights as guaranteed by the Constitutional provisions relating to due process and freedom of undue or unreasonable governmental interference affecting such rights as those to life, liberty and property. Federal agents, especially those employed by an agency as powerful as the IRS, are by practical definition "Those agents who can now openly and knowingly take your life, liberty and property, absent the touch-tone of due process, even out of spite, Ex. 26, and escape accountability because Congress in their conscientious efforts to protect the legitimate and necessary gathering of the Nation's revenues have innocently exempted this agency of the Government from suits of citizens of America seeking Constitutional relief and restitution."

No Court of law has yet to restrain these federal agents activities to fair, proper, and impartial application of the law which has over the years elevated them above the highest law and lawmakers of our land - The United States Constitution and the United States Supreme Court. Congress has recognized frequent abuse by federal agents, Ex. 27, and the Courts in the past have labeled IRS agents' actions as deplorable, yet, to date, no legitimate methods to safeguard the people of America from being subject to the demagogic treatment these federal agents frequently administer have been propounded. Petitioners pray this Court will restore the scales to Justice and the flame to the torch of Liberty by at the minimum inserting due process controls into law.

On 9-19-85, after notice of this action was delivered to Respondents, IRS

Special Agents decitefully posing as Federal Marshalls, armed with an "arrest order", instead of a warrant as represented by the agents, signed by Rafeedie against Phillips for failure to attend a contempt hearing, attempted to use it. Phillips refused to produce documents previously supplied on several occasions. Ex. 7. Costly steps had been taken to provide a full and complete disclosure of records, sufficient to satisfy Respondents. Copies, at Petitioners' cost, were supplied on demand, space provided to study all files, free access and unlimited time to accomplish the task of reexamination by Tadlock were given in West Virginia. Ex. 7. Tadlock gave every indcation that he had finished his work and left without further comment. After promptly complying with the Court Order it was dismissed on May 20, 1985 pending re-

opening upon showing of good cause within 30 days. Ex. 7. Upon receipt of the "new" Summons issued by "Rafeedie" Phillips in dismay contacted the clerk of the District Court for a reasonable explanation. The Summons, rubber stamped by a law clerk in the Judge's absence, seemed extemely irregular. The clerk of the District Court appeared confused that a new Contempt Order was even issued because of the previous Dismissal with identical case number (CV 84-4342-ER) and the passage of so much time. Phillips immediately sent a letter to Judge Rafeedie with an extensive list of documents already supplied to the Respondents and a copy of the Dismissal. Receipt of the letter was verified by both the mail room Supervisor Sherrie Carter and Marie Ruiz who signed for the package on 8-27-85, at 9:16 am. Judy Matthews, "Rafeedie's" Clerk, who had previously

instructed Phillips to put her name on the package for delivery denied to Phillips that it was ever received. Another examination, after the many good faith efforts to satisfy Respondents and with the cost and logistical problems of bringing the many thousands of files and documents to California from West Virginia without good cause, was unthinkable and smacked of harassment.

Nevertheless Phillips, through Counsel, defended himself Ex-parte, moving that the contempt proceedings be set aside because the demands of the Respondents had already been met and sanctions by the Court previously dismissed. Rafeedie ignored Phillips' plea or did not receive it. The Special agents presented a copy of the "Order" with bail typed on the bottom in the amount of $500,000.00. Ex. 7x. Neither the Court nor the Marshalls' office

has any record of an arrest warrant or bail being set. Now Phillips' very life is at the discretionary disposition of Respondents in that previous levies and seizures have made payment of "bail" impossible. Fifth Amendment Procedural Due Process protections and Eighth Amendment prohibitions against "Excessive bail" are violated. Phillips specified to the Court his inability to pay sanctions and produced a complete list of documents previously supplied to Respondents. The excessive bail meant Phillips would remain in jail. The Summons served on Phillips warned of financial penalties but made no mention of arrest or detention nor duration of imprisonment for failure to show. Ex. 7q, r. It is imperative that this Court expeditiously grant this Writ so that further deprivations may be halted and this dangerous

precedence of granting Respondents the means to both imprison and insure imprisonment through seizure of the very funds required to protect the Constitutional rights of Phillips and the use of its own "police force" to enforce its designs, not become a standard available for wide spread deprivation against the American People.

ARGUMENT

Are individual rights and liberties to be protected by the Supreme Law of this land or is our society to endure anew "McCarthyism"? I submit that unless the "Ninth's" decision is reversed this Nation will be giving the authority to federal agents to seek and destroy everything in sight with all of the lethal power of a nuclear tracking missile by effectively bestowing upon federal agents the subjective authority by adminstrative determin-

ation to make decisions that carry with them the full force and effect of law. Petitioners do not believe Congress or Constitutional Courts intended to grant federal agents this unbridled authority. The statement that "The law takes too long. We will ruin you" will no longer be an idle threat but the law of the land, Ex. 24a,b. The destruction will be accomplished by lower echelon federal agents armed with their leaderships management philosophy of dispensing official lawlessness will subjectively target their victims for annihilation in restating their agency's purposes by inserting schemes to destroy which is evidenced by their statements: "If they don't run with the money, then we'll get it all. After we sue them, and after the investors sue them, they won't have any property, they won't have any money. We'll even take

their cars. They'll have nothing left," Ex. 4, and "That is our intentions. You ain't seen nothing yet!" and "I'm here to screw a taxpayer out of two hundred million dollars", Ex. 25

Although the Petitioners in this case have never been adjudicated "abusive tax shelters" or promoters thereof, federal agents and the Courts are treating them as such absent affording them their rights guaranteed by the Constitution of the United States or even rights provided by their own agency's regulations and procedures, Ex. 21a, 22, 28a-e.

The assistance Petitioners sought on or about April 3rd, 1984 from "Byrne, Jr.", to find out the basis for the actions of Respondents in this case, is still begging for an answer for lack of a method to obtain judicial review. All of the actions of Petitioners within these

time frames have been successfully blocked by Respondents, their co-conspirators and Constitutional Courts' due to lack of subject matter jurisdiction. Petitioners are certain that the framers of the Constitution did not intend to allow the administrators of our Nation's laws to administer "McCarthyism" policies or to allow them to destroy the American Ideal at will by discretionarily bypassing Constitutional safeguards. In this case Respondents have assumed the roles of investigator, prosecutor, judge, jury and executioner. If Respondents cannot find a law, regulation or procedure to fit the circumstances to achieve their demagogic goals, Ex. 29a-c, they simply use their subjective discretionary powers or their "among other things" doctrine to fire at will, Ex. 30.

The Opinion of the "Ninth" has raised an administrative determination of Respondents to the level of judicial credibility. The "Ninth" erred when it misapplied facts, disallowed confrontation and cross-examination in rendering its Opinion. When the "Ninth" in its Opinion at page 6 lines 22-24 stated, "Phillips has failed to plead facts showing that he had a legitimate claim of entitlement to operate a business in violation of the tax laws," it clearly shows that the "Ninth" was misinformed. At no time did Petitioners ever claim such a right to operate a business in violation of the tax laws. All deductions and/or credits are statutorily granted by Congress. Petitioners claimed a legitimate right and entitlement to these statutory benefits.

The "Facts" stated by the "Ninth" are that "Phillips" (Petitioners) "filed an

action in the District Court seeking monetary damages from individually named IRS agents for issuance of prefiling notification letters." This is a misstatement of the facts, Ex. 32. The facts are that Petitioners sued Respondents for the knowing flagrant violation of their rights as guaranteed by the Constitution of the United States of America including the Fifth Amendment thereof. The truth of the matter is that Respondents conspired to deprive Petitioners of liberty, property and association rights maliciously, negligently and knowingly absent any trace of due process of law guaranteed by the Fifth Amendment. The issuance of the administrative determination in the form of the "prefiling notification letters" was simply a small part of Respondents overall scheme and conspiracy to destroy "WROGC's" and "1983 WROGC's" lawful businesses of

extracting oil and gas from the ground, for profit, and "Phillips'" business and occupation of forming and managing various businesses including but not limited to "WROGC" and "1983 WROGC". The Respondents overall scheme is further evidenced by their making illegal assessments against Petitioners and illegally levying on assets owned by Petitioners and assets not even owned by Petitioners, Ex. 9, 10. Illegal, improper, and abusive use of the Summons process was another means used by Respondents to seek out and destroy Petitioners, Ex. 7, 23. Blacklisting was yet another means used by Respondents to destroy Petitioners lawful businesses and/or occupation, Ex. 14. The "Ninth's" statement that the IRS refused to give Petitioners information they sought is misleading in it was actually the Respondents who refused to give information

requested and the IRS was not a party to the original action. Since the "Ninth" on its face states that the appeal was taken from the "Takasugi" Court when in fact it was an appeal from "Byrne, Jr." Court could the "Ninth" have been misinformed in regards to other critical matters?

The standard set forth in Greene v. McElroy, 360 U.S. 474, that in the absence of explicit authorization from either the President or Congress federal agents are not empowered to deprive "Phillips" of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination was not given consideration. Consider the United States v. Robel, 88 S.Ct. 420 (1967), "The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property'

concepts of the provisions of the Fifth Amendment to the United States Constitution that no person shall be denied liberty or property without due process of law." The demagogic means employed by Respondents in this case resulted in the actual taking of money out of bank accounts and trust deed payments absent due process. Respondents assessed miscellaneous jeopardy penalties by levying and/or levy in deference to the law, Ex. 8. Petitioners claim the right to operate a legitimate business absent unreasonable governmental interference as a cognizable property interest. Respondents knew that if they levied on Petitioners' assets that the businesses could not operate for long and would be destroyed. Respondents spitefully jeopardy assessed levies on "Phillips'", assets and alleged assets (owned by third

parties), Ex. 9, 10, 11, violated his cognizable property interests to specific property and his right to pursue a lawful occupation absent unreasonable governmental interference, i.e. denial of due process, blacklisting, etc. The total plan and goal of Respondents was to bestow a badge of infamy upon "Phillips", with the result that he be precluded from further legitimate employment or business activity in the oil and gas industry. In obtaining the above referred to goals Respondents denied "Phillips", of all traces of procedural due process procedures, form and/or substance. The tax deductions and/or credits claimed by Petitioners are proper, legitimate, and statutorily authorized, Ex. 31. The factual basis for taking of tax deductions and/or credits are set forth by Congress through the IRC and are interpreted for

propriety by either the Tax Court, Court of Claims or a United States District Court and the proper separation of power set out under the United States Constitution is thereby achieved. Such a sequence of proper separation of powers prohibits federal agents from crossing the judicial "authority-line" to make a determination which rises to the appearance of judicial credence when in fact this imposter is nothing more than a tool of expediency witnessed by the language contained in the pre-filing notification letters sent to Petitioners (Appendix A). These letters unto themselves violate the checks and balances of the system Congress has developed by allowing administrators who are unelected federal agents to cross over into the judicial "authority-line".

This great Nation can never tolerate or succumb to such a grant of power if it intends to maintain its great democratic posture of electing and/or appointing our Nation's lawmakers.

The "Ninth" erred in resting its decision on the government's much relied case of Mid-South Music Corp. v. Kolak, 756 F.2d 23 (6th Cir. 1984). The case at bar contains serious and critical Constitutional issues with deep meaning and wide reaching effects on our democratic society that touch upon the lives and livelihoods of all of the people of America and is absolutely distinguishable from Mid-South Music.

It is recognized that the prefiling notification letter procedure is available to the IRS under Revenue Procedure 83-78. However, the "among other things doctrine" of the administrative procedure which authorizes the sending out of prefiling

notification letters is of itself unconstitutional in that it allows federal agents to inform investors in an investment program that the investment program is an abusive tax shelter before the accused are afforded an evidentiary hearing. In the case at bar the letters were sent to Petitioners' investors out of spite, Ex. 26, which instantly attached the label of infamy "ABUSIVE TAX SHELTER" when in fact no showing has ever been made of any trace of abusiveness by Petitioners of this Nation's tax laws.

Petitioners have been the object of a personal vendetta by federal agents who have admitted that they conspired to ruin Petitioners' businesses and confiscate their property. More specifically, the basis for selecting Petitioners as a target for inquiry and interrogation was due to the Respondent's personal hate and malice towards a business associate and

close friend of Petitioner's, Terry Mabile. Mr. Mabile, former IRS agent, also an aggrieved yet unnamed Petitioner to the case at bar and an ex-patriot left the IRS and began his own business of rendering for profit business and financial advice. Mr. Mabile had given extensive business advice to Petitioners. It is because of this spite of Respondents against Mr. Mabile that Respondents initiated an investigation of Petitioners contrary to Revenue Procedures which strictly prohibit discriminatory selection of tax returns. These Respondents knew that by attacking Petitioners through the use of the ostensibly unfettered power of the IRS they could most effectively intimidate, blacklist, and destroy Mr. Mabile and anyone with whom he would be associated, i.e. Petitioner. Respondents have been successful.

The "Ninth" erred in basing its decision on the Mid-South Music decision instead of Revenue Procedure 83-78. Under Section 1 of Revenue Procedure 83-78 the issuance of prefiling notification letters is described in language which colors it in the same light as other Congressional enactments giving the appearance of having equal force and effect of law. In reference to the options available to the IRS in pursuit of a "potentially" abusive tax shelter the procedure improperly equates legitimate Congressional authority with "tailor-made" enforcement procedures which have been conveniently untested by Constitutional safeguards whose dutiful enactment are designed to protect the fundamental freedom of all Americans. Petitioners at the case at bar have been deprived equal protection of the law in that in all other instances known to date where federal agents believed a

"potentially" abusive tax shelter might exist, Respondents exclusively employed IRC section 7408. The case at bar is the only known deviation from this practice, Ex. 33.

The statutes IRC Sections 6111, 6112, 6700, 6701, 6702, and 6703 quite literally establish guilt by association alone, without any need to establish when an individual's association poses the threat feared by the government in proscribing it. The inhibiting effect on the exercise of First Amendment rights is clear. U.S. v. Robel, 88 S.Ct. 424, 389 U.S. 264 (1967). When legitimate concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a "less drastric" impact on the continued vitality of First Amendment freedoms. Shelton v. Tucker, U.S. v. Brown, 381 U.S.

437 461 85 S.Ct. 1707, 1721, 14 L.Ed. 2d 484 (1965).

Petitioners plead in view of the possibility that for purposes of satisfying minimum administrative scrutiny that the identification and investigation of Petitioners were sufficient to cause imposition of procedures designed to further determine if in fact there was an abusive tax shelter, then a request for injunctive relief under IRC 7408 would be an available Congressional authorized remedy. The assertion of penalties under IRC Sections 6700, 6701, 6702, and 6703 would be appropriate with sufficient specificity once an evidentiary hearing had determined an abusive tax shelter did in fact exist. Application of Revenue Procedure 83-78, which is neither the force or effect of law, Kopunek v. Director of the Internal Revenue 528 F. Supp. 134 (1981); Foxman v. Renison, 625 F.2d 429, 432 absent an

evidentary hearing raises an administrative determination promulgated by self-serving motives of the IRS to the level of Congressional authority. Enactment of IRC Sections 6111, 6112, 6700, 6701, 6702, and 6703 as well as Section 7408 were intended to correct problems in the collection process which had been brought to the attention of this Nation's legislative body by Respondents whose motives manifested the appearance of legitimate concern. Revenue Procedure 83-78 was not enacted upon proper presentation to Congress upon demonstrating a need for such a device, but rather was given life in response to the legal action brought by Mid-South Music Corp..

This lethal administrative procedure is a weapon that instantly colors conduct which is verified in Mid-South and the case at bar whereby the Courts believed the administrative determination was

factual and that the deductions and/or credits were "in violation" of this Nation's tax laws merely based on the language contained in the letters when in fact those deductions and/or credits were legitimately authorized by statute. In both the Mid-South case and the case at bar the touch-tone of due process was discretionarily bypassed because the lower Courts accepted the administrative determination at face value when in fact the intent of the lethal letter was to employ the "among other things doctrine" to spitefully destroy legitimate business enterprises and effectively blacklist all persons and entities associated with those lawful businesses. This proves beyond a shadow of a doubt that "the pen" of the Respondents' embossed the Petitioners' legitimate activities with the newest SCARLET LETTERS - "ABUSIVE" - whatever that means. It is a fact that deductions

and or credits are either legal or illegal, there is no middle ground. Tax avoidance is legal, evasion is illegal.

It is true that the Respondents are given broad discretionary authority in the assessment and collection of taxes. However, the limits of this discretionary authority surely must be protected by the safeguards of the Constitution to insure that the fundamental rights of all citizens of the United States cannot be simply disposed of at the whims of administrative expediency. If in the use of Revenue Procedure 83-78 clear Constitutional rights are endangered, then it is the duty of the federal agents and federal attorneys working with the Federal Government who use this tool to make sure that in its discretionary use the highest law of the land remains respected and it is not ignored or flagrantly violated. Where there is a possible deprivation of Consti-

tutional and/or property rights then an evidentiary hearing is properly within the due process right of the person upon whom the loss may be inflicted and it becomes an abuse of discretion to fail to give heed to this important Constitutional due process right. "It is not necessary for the person to actually suffer the loss before invoking the due process safeguards." United States v. Millman, 765 F.2d 27 (1985).

Although the "Ninth" did not address the immunity question, Petitioners believe that to be an error in that in order to maintain qualified immunity the federal agents must meet the "good faith" immunity test established in Scheuer v. Rhodes, 416 U.S. 232 (1974). The U.S. Supreme Court stated in Wood v. Strickland, 420 U.S. 322 95 Supreme Court (1974) 1001, "There could be no immunity from suit if the official knew or should have known that he was

violating one's Constitutional rights or if the action was taken with malicious intention to deprive one of a Constitutional right." Clearly in this case the Respondents knew or should have known that they were violating Petitioners' Constitutional rights. Respondent, H. Steven New is a federal attorney who has been admitted to practice. Respondent Bobbie J. Tadlock is a seasoned experienced federal agent with the IRS.

The "Ninth" was in error when it stated on page 9 of its Opinion that the Petitioners are afforded adequate post enforcement opportunities for judicial review because the case at bar did not involve any collection or assessment of taxes issues. It involves a spiteful conspiracy to deprive Constitutionally guaranteed rights. Petitioner "WROGC" is not a taxpayer nor is Petitioner "1983 WROGC".

Judicial review procedures afforded taxpayers are not available to them.

The case at bar clearly involves the implementation of that conspiracy by Respondents and abusing and misusing the badge of authority and power of the office of the IRS to fulfill their personal goals to destroy Petitioners against whom they have great personal animosity and hatred. The Petitioners in the case at bar do not hold the status of taxpayers but rather that of victims of a spiteful conspiracy to deprive rights by federal agents. Petitioners' action for damages in the case at bar which is the basis of this case was recognized as a Constitutional case by "Byrne, Jr." on April 3, 1984 when his Court stated, "There are some serious legal and Constitutional questions which will one day be resolved," Ex. 5a. To date, Petitioners have not

had the opportunity to have these questions resolved.

Petitioners believe the "Ninth" abused its discretion by not determining IRC Sections 6111, 6112, 6700, 6701, 6702, 6703, clashed with individual liberties protected by the Bill of Rights because those IRC Sections penalize alleged conduct (promoting and/or assisting in the promotion of an abusive tax shelter and the registration of people who have done nothing wrong). Petitioners believe these statutes are in direct conflict with the touch-tone of the Due Process clause which requires that a statute penalizing conduct must give fair notice of what conduct is proscribed and the "Ninth" should have voided those statutes for both vagueness and indefiniteness. Telegraph News v. Illinois Bell, 220 F. Supp. 621 (1963), affirmed 84 S.Ct. 1134, 376 U.S. 782; Howard v. U.S., 372 F.2d 294 (1967);

Galvin v. Press, 74 S. Ct. 737, 347 U.S. 522 (1954).

Petitioners also believe the "Ninth" abused its discretion when Respondents in oral argument admitted to that Court that they knowingly acted out of "spite" to flagrantly deprive Petitioners of procedural due process of law when the "Ninth" condoned Respondents' conduct.

In addition Petitioners believe the "Ninth" abused its discretion by allowing an administrative determination to rise to the level of judicial credibility absent an evidentiary hearing on facts, basis, law, evidence, confrontation or any other trace of procedural due process of law.

CONCLUSION

A favorable ruling of the Court without granting general relief would be of no consequence with regard to restitution to the Petitioners for injuries suffered at the hands of Respondents.

WESTERN RESERVE OIL & GAS COMPANY, LTD.
1983 WESTERN RESERVE OIL & GAS COMPANY, LTD.
TREVOR M. PHILLIPS

The specific relief prayed for includes but is not limited to the following:

(1) Internal Revenue Code sections 6111, 6112, 6700, 6701, 6702, and 6703 be declared unconstitutitonal and void for vagueness and indefiniteness as contrary to the Due Process clause of the

Constitution of the United States of America.

(2) Restitution (i.e. the making whole) by the United States to the Petitioners which includes, but is not limited to:

(a) payment in full of all creditors, accounts, notes, or other obligations;

(b) return of investments to all investors;

(c) reimbursement to the Petitioners of all necessary expenses including but not limited to accounting, legal, advisory and consulting fees;

(d) all extraordinary losses suffered due to the imposition of jeopardy levies absent any

statutory notice including but not limited to interest on deposits, bank charges, legal fees to obtain release of funds, etc., Kaufman v. C.I.R. 84-1641 (1st Cir. 3/85);

(e) letters of apology on stationary with the official letterhead of the Internal Revenue Service of the United States of America to all Petitioners, Petitioner's investors, employees, suppliers and any other persons abused by the vindictive actions of Respondents;

(f) return of all monies and/or property improperly taken by Respondents within 10 days of the decision of this Court;

(g) release of liens and levies within 10 days of the decision of this Court;

(h) release of any tax liability, penalty, interest, deficiencies, liens, etc., relating to the investors as a result of the Respondents' arbitrary actions;

(i) payment to Petitioners of all lost income based on the REMI reports for the period in question;

(j) an order restraining Respondents and any other agents or employees of Respondents from taking any action against Petitioners' investors and/or advisors;

(k) relief under IRC Section 7214 (a)(2) in that federal agents knowingly made demands for excessive sums from Petitioners, "WROGC" and "1983 WROGC", than are authorized by law and Petitioner Phillips penalty far exceeded that authorized by law by being haphazardly imposed;

(l) an order setting aside any deficiency on account of income tax for all Petitioners and investors because they were arbitrarily made. Helvering v. Taylor, 293 U.S. 507, 55 S.Ct. 28;

(m) such further relief both general and specific that this

Court deems right and just in these circumstances.

TREVOR M. PHILLIPS

(1) An order restraining Respondents from taking any further action against Trevor M. Phillips alleging any violation of laws, regulations or procedures as they relate to his business activity without notice to Trevor M. Phillips and authorization by this Court.

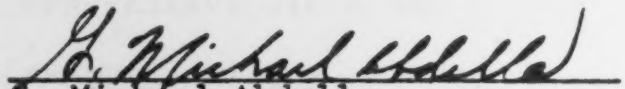
(2) Returning all assets taken under the miscellaneous penalty assessment including, but not limited to, monies and properties actually taken as well as legal, accounting, and advisory expenses expended or obligated as a result

thereof within 10 days of the decision of this Court.

(3) Payment to Trevor M. Phillips damages for lost income and mental anquish resulting from Respondent's actions.

For these reasons, a Writ of Certiorari should issue to review the judgment and Opinion of the "Ninth".

Respectfully submitted,



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A P P E N D I X A

[No. 84-6272]

[D.C. No. CV 84-3205-RMT, U.S. Court of Appeals, July 17,1985]

WESTERN RESERVE OIL & GAS CO.,
TREVOR M. PHILLIPS and
1983 WESTERN RESERVE OIL & GAS CO., LTD.,
Plaintiffs-Appellants, v.
H. STEVEN NEW, BOBBIE J. TADLOCK, MARY SAAVEDRA, MARY ELLEN DENERS, WILLIAM H. CONNETT, SCOTT J. CRABTREE, DONALD W. WOLF,
Defendants-Appellees.

[Opinion certified for publication]

OPINION

Appeal from the United States District Court for the Central District of California
Robert M. Tagasugi, District Judge, Presiding

Argued and submitted June 4, 1985
Pasadena, California

Before: ALARCON and POOLE, Circuit Judges, and ORRICK,* District Judge.

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*Honorable William H. Orrick, Jr., United States District Judge for the Northern District of California, sitting by designation.

ALARCON, Circuit Judge:

Western Reserve Oil and Gas Co., 1983 Western Reserve Oil and Gas, Ltd., and Trevor M. Phillips (hereinafter collectively referred to as Phillips) seek reversal of the district court order dismissing Phillips' suits for damages against individually named agents of the Internal Revenue Service (hereinafter IRS) pursuant to Fed. R. Civ. P. 12(b)(6). Phillips contends that the district court erred because te claim alleging deprivation of a liberty and property interest without due process of law was one on which relief could be granted.1

I

STANDARD OF REVIEW

The appropriate standard of review is not ain dispute. A dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is a ruling on a question of law and as such is reviewable de novo. Guillory v. County of Orange, 731 F.2d 1379, 1381 (9th Cir. 1984); North Star International v. Arizona Corp. Commission, 720 F.2d 578, 580 (9th Cir. 1983). The review is limited to the contents of the complaint. North Star, 720 F.2d at 581. To afirm this type of dismissal, it must appear to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved. Halet v. Wend Investment Co., 672 F.2d 1305, 1309 (9th Cir. 1982). All allegations of material fact are taken as true and

construed in the light most favorable to the non-moving party. North Star, 720 F.2d at 580.

II

FACTS

On May 3, 1984, Phillips filed an action in the district court seeking monetary damages from individually named IRS agents for issuance of "pre-filing notification letters." The basis for relief, as pleaded, was for damages for violation of his constitutional rights by a federal agent under Bivens v. Six Unknown Narcotics Agents, 403 U.S. 388 (1971).

Phillips is the sole general partner of two companies in the business of producing and developing oil and gas; Western Reserve Oil and Gas Co. and 1983 Western Reserve Oil and Gas Co., Ltd.

Both companies are also California limited partnerships in which various individuals (hereinafter partners) purchased limited partnership interests from the years 1981-1983.

In a letter dated March 22, 1984, the IRS advised Phillips that its investigation showed that there was a basis for concluding that a claim by the Phillips partners for tax benefits for the year 1983 would not compllly with the income tax laws.2 Phillips was notified oon April 41, 1984, that, pursuant to Rev. Proc. 83-78, 1983-2 Cum. Bull. 595 (hereinafter Rev. Proc. 83-78) he would be afforded an opportunity to meet with IRS agent Bobbie J. Tadlock (hereinafter Tadlock) and District Counsel attorney Steve New (hereinafter New) to present any acts or legal arguments to demonstrate

that the claimed tax benefits complied with federal income tax laws.3

Phillips attempted to obtain specific information concerning the factual basis for the IRS determination that his company may be operating as an abusive tax shelter. The IRS, however, refused to give Phillips the information he sought. On [sic] April 4, 1982, Phillips met with the IRS agents to dissuade them from issuing any pre-filing notification letters to the limited partners in his companies. This attempt was unsuccessful. On April 11, the IRS sent pre-filing notification letters to the Phillips' partners in Western Reserve Oil and Gas Co.4 The partners in 1983 Western Reserve Oil and Gas Co., Ltd. did not receive pre-filing notification letters.

The complaint as amended alleges that Phillips was denied his Fifth Amendment right to liberty and property because (1) the mailing of the letters had the "irreversible consequence of destroying the means by which Phillips secure[d] his livelihood"; (2) the letters had a "chilling effect" because investors would withdraw; and (3) the letters had the same damaging effect on his lifelihood as a "jeopardy assessment."

The complaint states that the agents acted "under color of authority" when they issued the pre-filing notification letters to the investors. It further alleges, however, that the actions undertaken in compliance with Rev. Proc. 83-78, were motivated by a "personal hate and vendetta" directed towards Phillips' business partner, Terry Mabile, a former

IRS agent. Phillips alleges that the deprivaton occurred because the agents knew that through the use of their "power with the IRS' they could "most effectively injure, embarrass and destroy Mabile and those with whom he was associated." The complaint also alleges that the April 4 meeting with the IRS and the procedures available for review following issuance of the letters did not provide him with an adequate pre-deprivation hearing or sufficient notice of the specific legal theory or factual basis in violation of his right to procedural due process.

III

DISCUSSION

Phillips contends that the mailing of the pre-filing notification letters resulted in the deprivation of his liberty and property without adequate notice and

opportunity to be heard in violation of his right to due process.

Bivens v. Six Unknown Narcotics Agents, 403 U.S. 388 authorizes the filing of an action against individual federal agents by a citizen "suffering a compensable injury to a constitutionally protected interest." Butz v. Economou, 438 U.S. 478, 504 (1978) (emphasis added). We are required to dismiss a complaint brought pursuant to Bivens unless it appears from the face of the complaint that the citizen "has stated a cause of action which asserts . . . [a constitutionally protected] right." Davis v. Passman, 442 U.S. 228, 234 (1979).

A. Property Or Liberty Interest

To establish a cognizable property interest within the meaning of the due process clause of the Fifth Amendment, "a

person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He lmust, instead, have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (emphasis added).

Phillips claims that the right to continue the operation of a business is a cognizable property interest. We disagree.

The same argument was rejected by the Sixth Circuit in Mid South Music Corp. v. Kolak, 756 F.2d 23 (6th Cir. 1984). The facts in Mid South Music Corp., the appellant brought suit against the United States and various federal officals of the IRS seeking compensatory and punitive damages for a violation of its constitutional rights. The alleged

violations arose from the pre-filing notification letter sent by the IRS to investors in the company advising them that deductions from their investment in Mid South would not be allowed. The complaint alleged that the pre-filing notification letter caused destruction of business thereby depriving the company of property in violation of the Fifth Amendment. The Sixth Circuit held as follows: "No constitutional claim is stated against the individual defendants because the plaintiff has alleged no property interest cognizable under the Fifth Amendment." Id. at 25.5 The Court noted that "[t]he plaintiff is in effect claiming that its business interests should be protected from IRS communications intended to convey to taxpayer investors information which w8ill

prevent them being penallized for erroneously taking deductions on their income tax returns." Id. Phillips has failed to plead facts showing that he had a "legitimate claim of entitlement" to operate a business in violation of the tax laws.

Our holding that Phillips has failed to allege a cognizable property interest is also supported by the decision of the Circuit Court for the District of Columbia in Investment Annuity, Inc. v. Blumenthal, 609 F.2d 1, 7 (D.C. Cir. 1979), cert. denied, 446 U.S. 981 (1980). In Investment Annuity, Inc., the Court held that annuity sellers did not have a sufficient "property interest" to support a claim that the IRS violated due process rights by notifying annuity buyers of recent IRS positions on disallowance of

deductions. Id. at 7. The court concluded in Investment Annuity, Inc. that the actions taken by the IRS were too attenuated to constitute a deprivation of the alleged property interest. Id. at 7.

Phillips further claims that a constitutionally arecognized liberty interest was denied by the actions of the IRS agents. This claim is grounded upon the same assertion as the property interest claim; i.e. that the issuance of pre-filing notification letters destroyed Phillips' business. Phillips relies on Sanderson v. Village of Greenhills, 726 F.2d 284 (6th Cir. 1984) to support this contention. This reliance is misplaced.

In Sanderson the plaintiff alleged that he was deprived of his "liberty" interest to engage in a lawful business because local officials did not want a

billiard parlor in the Village of Greenhills. Three officials claimed that they had the inherent power to disapprove of a business "irrespective of any existing regulatory ordinance." Id. at 287. The district court dismissed this claim as failing to state a cause of action under section 1983. The sicth Circuit reversed. The Court noted that, while "there can be no unfettered freedom to engage in a business which may be properly regulated," under the facts as pleaded, the action of the village officials was not motivated by an attempt to enforce a regulatory ordinance. Id.

In the matter sub judice, the filing of the pre-notification letters attached to the complaint show that the federal agents were acting under existing regulation directed at protecting

investors from taking invalid deductions. Thus, unlike the facts presented in Sanderson, the regulatory basis for the actions of the federal agents is clearly set forth in the complaint.

Phillips further contends that he was denied a federally cognizable interest because the agents acting "with malice," and intended "to injure [and] embarass" him. This contention is also devoid of merit. We have held conduct by an individual acting under color of law which is designed to harass and embarrass does not constitute a denial of a cognizable "liberty" or "property" interest in a claim brought under section 1983. Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1353 (9th Cir. 1981), aff'd sub nom. Kush v. Rutledge, 460 U.S. 719 (1983). Rather, such "transgressions

constitute nothing more than a tort 'which the state may protect against . . . by virtue of its tort law.'" Id. quoting Paul v. Davis, 424 U.S. 693, 712 (1975).

B. Denial of Procedural Due Process

Phillips also contends that his right to procedural due process was violated because he did not receive adequate notice or an opportunity to be heard. There is no support in the record for this contention.

As set forth above, Phillips was given written notice that the IRS was considering imposition of the sanctions provided in Rev. Proc. 83-78. He was informed in the letter dated March 22, 1984, that the agents had determined that his company would not be in compliance with the Federal tax laws if tax benefits to the partners were claimed. Thereafter,

Phillips was afforded the opportunity to meet with the IRS agents to establish the legitimacy of the tax shelters.

The complaint alleges that the IRS agents refused to give Phillips detailed information concerning the factual basis for their "abusive tax shelter" determination prior to and at the April 4th meeting and that Phillips was thereby denied a fair opportunity to present his case. The complaint further alleges that the "hearing" was infirm since Phillips' reequest for a continuance was denied arbitrarily.

Assuming, as we must, that these allegations are true, North Star, 720 F.2d at 580, Phillips nonetheless failed to state a sufficient claim of denial of due process. No hearing is required prior to the assessment or collection of taxes so

long as the aggrieved party has adequate opportunity for later judicial determination of liability. Phillips v. Commissioner, 283 U.S. 589, 5595 (1931); Boday, et al. v. United States, 759 F.2d 1472, 1475 (9th Cir. 1985); Tavares v. United States, 491 F.2d 7255, 726 (9th Cir. 1974), cert. denied, 420 U.S. 925 (1975). Phillips is afforded adequate post-enforcement opportunities for judicial review. Congress has provided for suits concerning the adjustment or readjustment of disputed items of a partnership. See 26 U.S.C. 1346 (a) (1) (jurisdiction in United States District Courts for suits against uaanited States for recovery of erroneously or illegally assessed or collected taxes).

C. No Bivens Violation Where Agent Acting Within the Scope of His

Authority

A federal officer can be held liable for damages pursuant to Bivens only if his constitutional torts knowingly were committed outside the scope of his statutory authority. Granger v. Marek, 583 F.2d 781, 783 n.4 (5th Cir. 1978). Here, the agents were acting well within the scope of the authority delegated to the IRS.

Rev. Proc. 83-78 was implemented for the express purpose of ensuring "more effective compliance with the tax laws." Rev. Proc. 83-78 2. This procedure is in complaince with the Internal Revenue Code which "imposes on the Secretary of the Treasury, and the IRS as his designate, a broad duty to enforce the tax laws" and manifests "[c]ongressional intent to provide the Secretary with broad

latitude to adopt enforcement techniques helpful in the performance of his tax collection and assessment responsibilities." United States v. Euge, 444 U.S. 707, 716 and n.9, rehearing denied, 446 U.S. 913 (1980).

These powers are necessary to the fulfillment of a significant function of the IRS;; to prevent commission of crimes. See United States v. Little, 753 F.2d 1420, 1436 (9th Cir. 1984) (statutory grants of authority encompass "undercover criminall investigations which may be necessary and proper to . . . the general enforcement of revenue laws.").

CONCLUSION

Phillips' complaint failed to allege sufficient facts to establish a cognizable property or liberty interest or that the conduct of the federal agents in sending

the pre-filing notification letters directly deprived him of his right to conduct his business solely as the result of arbitrary or capricious motivation. The judgment of the district court is AFFIRMED.

FOOTNOTES

1 Phillips also contends that the district court erroneously dismissed the complaint on the alternative ground that the IRS agents were immune from suit. We do not address this issue since we find that the complaint properly was dismissed for failure to state a claim. Fed. R. Civ. P. 12(b)(6).

2 The letter sent to Phillips by the IRS provided in full:

> Subject: Western Reserve Oil & Gas Company, Ltd., and 1983 Western Reserve Oil & Gas Company Ltd.
>
> Dear Mr. Phillips:
>
> Based upon an examination of promotional material, partnership books and records (only with respect to Western Reserve Oil & Gas Company, Ltd.) and third party information, Revenue Agent Bobbie J. Tadlock and District Counsell Attorney Steve New have determined that there is a basis for concluding that the partners of Western Reserve Oil & Gas Company, Ltd., and 1983 Western Reserve Oil & Gas Company, Ltd., will not be in compliance with the FEderal income tax laws if they claim the tax benefits represented by the general partners and promoters to

be available. Moreover, Mr. Tadlock and Mr. New have determined that there is a basis for: (1) the assertion of the promoter penalties referred to in I.R.C. 6700; and (2) an application for injunctive relief under I.R.C. 7408.

In accordance with Rev. Proc. 83-78, 1983-43 I.R.B. 44, you are hereby offered an opportunity on April 4, 1984, at 11:00 a.m., at the internal Revenue Service Office at 24000 Avila Road, Laguna Niguel, California, to meet with Revenue Agent Tadlock and District Counsel Attorney New to present any facts or legal arguments that demonstrate that there is a basis for concluding that the claimed tax benefits of Western Reserve Oil & Gas Company, Ltd., and 1983 Western Reserve Oil & Gas Company, Ltd., comply with the Federal income tax laws.

Generally, no extensions of time will be granted for the meeting except in extenuating circumstances. You will not abe entitled to any additional meetings with the Internal Revenue Service. No final decisions will be made at the meeting concerning the determination that the Internal Revenue Service will finally make. If you fail to attend the meeting or fail to provide documents and information previously requested, the Internal Revenue Service will proceed based

on the available promotional materials, books, records, and/or third party information.

Sincerely yours,

(Signed) Donald W. Wolf
DONALD W. WOLF
District Counsel

3 Rev. Proc. 83-78 provides that the IRS may request injunctive relief or assert penalties under 26 U.S.C. 7408, 6700 and issue pre-filing notification letters to invyestors once the IRS has identified an abusive tax shelter. Rev. Proc. 83-78 1, 5. The purpose of the pre-filing notification letters is to "advise investors in the promotion that based upon review of the promotion it is believed that the purported tax benefits are not allowable and . . . also advise the investors of the possible consequences if such benefits are claimed on their tax returns." Rev. Proc. 83-78 6.02.

These letters read as follows:

Re: Tax Shelter Promotion:
Western Reserave Oil & Gas Co. Ltd. Tax year: 1983

Dear Sir:

Our information indicates that you were a partner in the above partnership during the above tax

year. Based upon our review of the partnership's tax shelter activities, we have apprised the Tax Matters Partner that the purported tax shelter deductions and/or credits are not allowable and, if claimed, we plan to examine the return and disallow the deductions.

The Internal Revenue Code provides in appropriate cases for the application of a negligence penalty under Section 6653(a), the overvaluation penalty under Section 6659 and/or substantial underpayment penalty under Section 6661 of the Internal Revenue Code with respect to the partners.

If the Tax Matters Partner decides to claim such deduction on the partnership return or the partnership return has already been filed claiming such deductions and/or credits, you may wish to file a request for administrative adjustments as provided by Section 6227 of the Internal Revenue Code to amend partnership items. If you choose to file an administrative adjustment request, please file such with your service center at the following address:

Internal Revenue Service
Fresno Service Center
Attention: Pre-filing
Notification Coordinator
P.O. Box 12866
5045 East Butler

Fresno, CA 93779

5 The court also held that allegations that the pre-filing notification letter revealed the taxpayer's identity as a taxpayer stated a colorable claim against the United States for the statutory violation of the Internal Revenue Code provision governing confidentiality of returns. 26 U.S.C. 6103. Mid South Music Corp., 756 F.2d at 25-26. This issue is not before us since is was not raised by Phillips in the complaint.

Supreme Court, U.S.
FILED
DEC 17
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-681

In the Supreme Court of the United States

OCTOBER TERM, 1985

WESTERN RESERVE OIL AND GAS CO., LTD., ET AL., PETITIONERS

v.

H. STEVEN NEW, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Washington, D.C. 20530
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TABLE OF AUTHORITIES

Page

Cases:

Bell v. *Hood*, 327 U.S. 678 5

Board of Regents v. *Roth*, 408 U.S. 564 ..... 5, 6

Bob Jones University v. *Simon*, 416 U.S. 725 ..... 5, 6

Butz v. *Economou*, 438 U.S. 478 5

Cleveland Trust Co. v. *United States*, 421 F.2d 475, cert. denied, 400 U.S. 819 7

Davis v. *Scherer*, No. 83-490 (June 28, 1984) 7

Duke Power Co. v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 5

Harlow v. *Fitzgerald*, 457 U.S. 800 ..... 4, 7

Investment Annuity, Inc. v. *Blumenthal*, 609 F.2d 1, cert. denied, 446 U.S. 981 ..... 3, 5, 6

Kosak v. *United States*, No. 82-618 (Mar. 21, 1984) 4

Luhring v. *Glotzbach*, 304 F.2d 560 7

Mid-South Music Corp. v. *Kolak*, 756 F.2d 23 ..... 3, 5

Mid-South Music Corp. v. *United States Dep't of the Treasury*, 579 F. Supp. 481, aff'd *sub nom. Mid-South Music Corp.* v. *Kolak*, 756 F.2d 23 ..... 5, 7

Page

Cases—Continued:

Paul v. *Davis*, 424 U.S. 693 6

Phillips v. *Commissioner*, 283 U.S. 589 ..... 4, 6

Rosenberg v. *Commissioner*, 450 F.2d 529 .... 6, 7

Rutledge v. *Arizona Board of Regents*, 660 F.2d 1345, aff'd *sub nom. Kush* v. *Rutledge*, 460 U.S. 719 6

Sanderson v. *Village of Greenhills*, 726 F.2d 284 3

United States v. *Euge*, 444 U.S. 707 5

United States v. *Lovasco*, 431 U.S. 783 4

Constitution and statutes:

U.S. Const. :

Amend. I 4

Amend. V (Due Process Clause) 1, 2, 3, 5

Internal Revenue Code of 1954 (26 U.S.C.):

§ 6226 ..... 4, 6

§ 6228 ..... 4, 6

§ 6302(b) 4

§ 6331(d)(2) 4

§ 6703 4

28 U.S.C. 1346(a)(1) 4

Miscellaneous:

Rev. Proc. 83-78, 1983-2 C.B. 595 ..... 2, 4

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners brought this action for damages against Internal Revenue Service (IRS) personnel, alleging that their rights of due process under the Fifth Amendment to the United States Constitution had been violated by the IRS's issuance of "pre-filing notification letters" to investors in the petitioners' limited partnerships.

1. At the time pertinent to this action, petitioner Trevor Phillips was the sole general partner of two California limited partnerships, Western Reserve Oil and Gas Company (Western Reserve) and 1983 Western Reserve Oil and Gas Company (1983 Western Reserve), which were in the business of producing and developing oil and gas during calendar year 1983 (Pet. App. A4-A6). Various other individuals had purchased interests in the limited partnerships (*id.* at A5).

The Internal Revenue Service informed Phillips, in a standard "pre-filing notification letter," that it believed that there was "a basis for concluding that the partners of [Western Reserve and 1983 Western Reserve] will not be in compliance with the Federal income tax laws if they claim the tax benefits represented by the general partners and promoters to be available" (Pet. App. A22-A23 n.2). The letter offered Phillips an opportunity, which he accepted, to meet with representatives of the IRS and present facts and legal arguments showing that the claimed tax benefits complied with federal income tax laws (*ibid.*; *id.* at A6). See Rev. Proc. 83-78, 1983-2 C. B. 595. Following the meeting, however, the IRS sent each of Western Reserve's partners a pre-filing notification letter advising them that it believed deductions or credits purportedly accruing to Western Reserve were not allowable, and that it planned to examine returns claiming such deductions or credits and to disallow them (Pet. App. A6; *id.* at A24 n.3).

2. Petitioners then instituted this action for damages in district court (Pet. App. A4). In their complaint, as amended, they alleged that the issuance of the pre-filing notification letters deprived them of liberty and property without due process of law in violation of the Fifth Amendment, in that the mailing of the letters had (1) the " 'irreversible consequence of destroying the means by which Phillips secure[d] his livelihood,' " (2) "a 'chilling effect' because investors would withdraw," and (3) "the letters had the same damaging effect on his lifelihood [*sic*] as a 'jeopardy assessment' " (*id.* at A7, quoting complaint). The complaint stated that the respondents acted " 'under color of authority' " in issuing the pre-filing notification letters, but that the action was motivated by a personal animosity toward a business partner of Phillips whom the IRS personnel hoped to " 'injure, embarrass and destroy' " (*id.* at A7-A8, quoting complaint). The complaint also

alleged that the meeting with the IRS did not satisfy the requirements of due process because Phillips was not given sufficient notice and explanation of the IRS's position (*id.* at A8).

The district court granted respondents' motion to dismiss the action (Pet. App. B14), holding that the complaint failed to state a cognizable claim (*id.* at B4-B9), and that, in any event, respondents were immune from suit (*id.* at B9-B14). Petitioners appealed and the court of appeals affirmed (*id.* at A21; the court of appeals' decision is reported at 765 F.2d 1428).

The court of appeals held that petitioners had failed to allege the deprivation of a property or liberty interest cognizable under the Fifth Amendment (Pet. App. A9-A16). The property claim was rejected (*id.* at A10-A13) since Phillips had no legitimate claim of entitlement to operate a business in violation of the tax laws (*id.* at A12); the court of appeals cited as support *Mid-South Music Corp.* v. *Kolak,* 756 F.2d 23 (6th Cir. 1984), and *Investment Annuity, Inc.* v. *Blumenthal,* 609 F.2d 1 (D.C. Cir. 1979), cert. denied, 446 U.S. 981 (1980). The liberty interest claim was also rejected (Pet. App. A13-A15) and *Sanderson* v. *Village of Greenhills,* 726 F.2d 284 (6th Cir. 1984), distinguished, since "the regulatory basis for the actions of the federal agents is clearly set forth in the complaint" (Pet. App. A15). With regard to the claim that Internal Revenue Service personnel acted with malice, the court found that such conduct here would not constitute the denial of a liberty or property interest either (Pet. App. A15-A16).

The court of appeals also held that no violation of procedural due process had occurred (Pet. App. A16-A18). It reasoned that a hearing is not constitutionally required prior to the assessment or collection of taxes, so long as the

aggrieved party has an opportunity for later judicial determination of liability, citing, inter alia, *Phillips* v. *Commissioner*, 283 U.S. 589, 595 (1931) (Pet. App. A17-A18). In this case, it pointed out, Congress has provided for suits regarding adjustment or readjustment of disputed partnership items (765 F.2d at 1434; the supporting citation by the court of appeals to 26 U.S.C. 6226 and 6228 is omitted at Pet. App. A18, and 28 U.S.C. 1346(a)(1) is miscited as "26 U.S.C. 1346(a)(1)").[1]

3. The decision below in this fact-bound action is correct, and is in accord with decisions of other circuits. No further review is warranted.[2]

The Secretary of the Treasury may, under 26 U.S.C. 6302(b), use such "reasonable devices or methods as may be necessary or helpful in securing a complete and proper collection" of taxes. This Court has stated that the Internal

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[1]The court of appeals also found (Pet. App. A18-A20) the respondents to have acted within their statutory authority. It is relevant to an immunity inquiry, of course, whether an official has violated any "clearly established *statutory* or constitutional rights," *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added), but the court had earlier said it would not reach the immunity question (Pet. App. A22 n.1). There was no need to do so, since the court had already concluded that there was no due process violation.

[2]Petitioners have raised a number of issues in their petition for the first time in this case. For example, they urge that various sections of the Internal Revenue Code are unconstitutional (Pet. 1, 11-12, 14-15, 46, 54, 56), that they suffered cruel and unusual punishment at the hands of respondents (Pet. 7), that respondents abridged their First Amendment freedom of association (Pet. 8-9,10), that Rev. Proc. 83-78, *supra*, is void for vagueness (Pet. 13), that excessive bail was set (Pet. 30), and that the notice provisions of 26 U.S.C. 6331(d)(2) and 6703 were somehow violated (Pet. 13-14). These contentions and other allegations of misconduct were neither asserted in petitioners' complaint nor raised in any other manner below. Accordingly, they are not properly before this Court. See, *e.g.*, *Kosak* v. *United States*, No. 82-618 (Mar. 21, 1984), slip op. 2 n.3; *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977).

Revenue Code "imposes on the Secretary * * * a broad duty to enforce the tax laws," *United States* v. *Euge*, 444 U.S. 707, 716 (1980), and that Congress intended "to provide the Secretary with broad latitude to adopt enforcement techniques helpful in the performance of his tax collection and assessment responsibilities" (*id.* at 716 n.9). The pre-filing notification letters here were such a reasonable device. See *Mid-South Music Corp.* v. *United States Dep't of the Treasury*, 579 F. Supp. 481, 483-484 (M.D. Tenn. 1983), aff'd *sub nom. Mid-South Music Corp.* v. *Kolak*, 756 F.2d 23 (6th Cir. 1984).

a. The mere allegation of a constitutional cause of action is not sufficient to survive a motion to dismiss if the constitutional claims are "frivolous," "insubstantial," "patently without merit," or "immaterial and made solely for the purpose of obtaining jurisdiction." See *Butz* v. *Economou*, 438 U.S. 478, 507-508 (1978); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 70 (1978); *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946). Petitioners' Fifth Amendment claim is patently frivolous, and the dismissal of petitioners' action was properly affirmed by the court of appeals.

As the Sixth Circuit concluded in *Mid-South Music Corp.* v. *Kolak*, 756 F.2d 23, 25 (1984), the claimant's interest in doing business free of the IRS's conveying information it believes to be accurate to taxpayers, and the relationship between the pre-filing notification letters and the alleged injury (a loss of patronage from the recipients of such letters), are too attenuated to implicate the Due Process Clause. See also *Bob Jones University* v. *Simon*, 416 U.S. 725, 746-748 (1974); *Investment Annuity, Inc.* v. *Blumenthal*, 609 F.2d at 7. One must have a "legitimate claim of entitlement" to a benefit in order to claim a property interest in it. *Board of Regents* v. *Roth*, 408 U.S. 564,

577 (1972). Petitioners here have only a unilateral expectation of continued patronage from investors and their associates, and that is not a constitutionally protected property interest. *Ibid; Investment Annuity, Inc.* v. *Blumenthal*, 609 F.2d at 7-8. Nor have the petitioners been deprived of a "liberty interest." Their claim that the designation of Western Reserve as an abusive tax shelter in the pre-filing notification letters has impaired their business opportunities amounts to nothing more than a purported defamation. The imposition of a defamatory stigma upon a citizen by an official acting under color of law does not constitute a deprivation of liberty within the meaning of the Fifth Amendment; it is, at most, a common-law tort. See *Paul* v. *Davis*, 424 U.S. 693 (1976); *Rutledge* v. *Arizona Board of Regents*, 660 F.2d 1345, 1353 (9th Cir. 1981), aff'd *sub nom. Kush* v. *Rutledge*, 460 U.S. 719 (1983). There is also no plausible suggestion that the IRS has "foreclosed [petitioners'] freedom to take advantage of other [business] opportunities." *Board of Regents* v. *Roth*, 408 U.S. at 573.

In any event, petitioners' due process claim is meritless since, as the court of appeals explained (Pet. App. A17-A18), they have adequate post-enforcement opportunities for judicial review. Congress has provided for later judicial determinations of liability in this area, which is all that due process requires. *Bob Jones University* v. *Simon*, 416 U.S. at 746-748; *Phillips* v. *Commissioner*, 283 U.S. 589, 595-601 (1931); *Rosenberg* v. *Commissioner*, 450 F.2d 529, 531-533 (10th Cir. 1971). Phillips, on behalf of all the partners, may litigate the propriety of any disputed tax benefits deriving from Western Reserve in the Tax Court, the district courts, or the Claims Court. See 26 U.S.C. 6226 and 6228.[3]

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[3]Even where a hearing is provided for under Internal Revenue Service procedural rules, the failure to provide it does not violate a taxpayer's due process rights, because such rules are merely "directory rather than

b. Finally, it is apparent that respondents are entitled to the defense of official immunity. They did not violate any clearly established statutory or constitutional rights; indeed, the issuance of pre-filing notification letters had been approved by the only court to have addressed the question. See *Mid-South Music Corp.* v. *United States Dep't of the Treasury, supra.* Regardless of petitioners' allegations of malicious intent, then, respondents would enjoy qualified immunity from suit, if not absolute immunity. *Harlow* v. *Fitzgerald,* 457 U.S. 800, 817-818 (1982); see also *Davis* v. *Scherer,* No. 83-490 (June 28, 1984).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DECEMBER 1985

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mandatory." *Rosenberg* v. *Commissioner,* 450 F.2d at 533; *Cleveland Trust Co.* v. *United States,* 421 F.2d 475, 481-482 (6th Cir.), cert. denied, 400 U.S. 819 (1970); *Luhring* v. *Glotzbach,* 304 F.2d 560, 565 (4th Cir. 1962).